

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 3, 2001

Case No.: **2000-INA-137**
CO No.: **P1999-NY-02416637**

In the Matter of:

ORZA BAKERY, INC
Employer.

on behalf of

PABLO DAMIAN
Alien.

Appearance: Jeffrey Gabel, Esq.
New York, New York

Certifying Officer: Dolores Dehaan
New York, New York

Before: Vittone, Burke and Wood

DECISION AND ORDER

Per Curiam. This matter arises from Orza Bakery, Inc.'s ("Employer") request for review of the United States Department of Labor Certifying Officer's ("CO") denial of an application for permanent alien labor certification for the position of Baker.¹ Employer's request for review was made pursuant to 20 C.F.R. § 656.26.² The issue for review is whether Employer unlawfully rejected a U.S. worker by failing to interview a qualified candidate who appeared at Employer's place of business at the invitation of Employer, but without an appointment.³

¹ The position of Baker is classified under the Dictionary of Occupational Titles code 526.381-010.

² Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this section are in Title 20.

³ We base our decision on the records upon which the CO denied the certification and Employer's request for review as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 19, 1997 Employer filed an application for alien labor certification on behalf of, Pablo Damian (“Alien”) for the position of “Baker” (AF 9-16). The CO proposed to deny certification in a *Notice of Findings* (NOF) dated July 14, 1999. (AF 46-47). The CO in the NOF indicated, *inter alia*, that one applicant, Joseph Cataudella, demonstrated more than two years experience in the occupation and consequently was qualified for the position offered.

The NOF further stated that Employer rejected applicant Joseph Cataudella because he also lacked experience baking bread and was requested to return for a formal interview, but failed to do so.⁴ The CO found that Employer’s contention that baking bread is a primary function of the position offered is not supported by the job duties presented in item 13 of the ETA-750 or in the job advertisement.

While bread is mentioned as one of the items produced, duties clearly reflect that job entails baking pastries and other baked goods. Nothing in the description or requirements stresses bread baking as a “core” duty. Employer’s rejection of these applicants for the reasons given is tantamount to rejection for other than lawful job related reasons.

(AF 46). The CO concluded the NOF by finding that this candidate should have been offered the opportunity to demonstrate their skills at the initial time of contact and advised Employer that he had to further document specific lawful job related reasons for his rejection.

Employer submitted his rebuttal on August 9, 1999. (AF 48–51). In the rebuttal, Employer asserted that it is irrelevant to address the experience of Joseph Cataudella, because: “This applicant did not appear for an interview after speaking to me and he was therefore rejected.” (AF 50) (emphasis in original). Employer further argued that baking bread is a job duty clearly listed on the ETA 750A form at item 13 and was included in the advertisement, and since Mr. Soler lacked experience in baking bread, he was rejected for lawful job related reasons.

On August 30, 1999 a *Final Determination* (“FD”) was issued denying certification of Employer’s application. (AF 52-53). In the FD, the CO found that Employer rejected Joseph Cataudella for other than lawful job related reasons. The CO stated that as reflected in the Recruitment Report, Mr. Cataudella did appear in person at Employer’s place of business on the week of January 4, 1999, as a result of Employer’s letter inviting him for an interview. The CO concluded that Employer should have used that opportunity to personally interview Mr. Cataudella. The CO found that it is possible that Mr. Cataudella was not able to return for a second interview because he could not take more time off from his job. On September 29, 1999, Employer submitted a request for review of the final determination.

⁴ The statement of recruitment results states that Mr. Cataudella appeared without an appointment on the week of January 4, 1999, was given a tour of the premises and was requested to return the following day.

DISCUSSION

A basic purpose of the labor certification process is to determine whether there are sufficient U. S. workers able, willing and qualified to perform the work under consideration. As part of that process, § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. An employer that fails to explain or document the U.S. applicant's lack of qualifications fails to specify a lawful job-related reason for rejecting the U.S. applicant. *See, e.g., Seaboard Farms of Athens, Inc.*, 1990-INA-383 (Dec. 3, 1991). Additionally, an employer must demonstrate that reasonable good faith efforts to recruit U.S. workers have been unsuccessful. § 656.21(b)(1)(6); *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). A good faith effort at recruitment requires proof of reasonable efforts to contact and interview the applicants. *Garment Associates*, 1991-INA-143 (July 14, 1992).

In reviewing the resume of Joseph Cataudella, we agree with the CO's finding that the applicant is qualified for the position offered as he meets the minimum requirements listed in the ETA 750A and the job advertisement. (AF 67). We further find that Employer failed to recruit Cataudella in good faith, and thus demonstrated that the position was not clearly open to U.S. workers.

Employer's recruitment effort was limited to a letter acknowledging Mr. Cataudella's interest in the position and inviting him to make arrangements to come for an interview. (AF 36). This letter triggered Mr. Cataudella's appearance within days after receiving the letter, a clear indication of his interest in the position.⁵

Employer's effort did not match the eagerness of Mr. Cataudella; it merely required him to return the following day for a formal interview. Employer did not advise the CO of any additional effort made by him subsequent to Mr. Cataudella's appearance. Employer did not offer any specific evidence justifying why he limited his contact with Mr. Cataudella to a "tour" of the premises and a request to file a data sheet. (AF 38). Specifically, Employer did not indicate what specific circumstances prevented him from conducting an interview on the day of Mr. Cataudella's appearance. After this treatment, the fact that he chose not to return to the Employer's premises for a second straight day is understandable. Such actions on the part of Employer evidence an intent to drive away this qualified applicant and demonstrate Employer's lack of good faith recruitment.

This Board finds that Mr. Cataudella was available, willing, able, and qualified at the time of the initial contact. Since Employer did not conduct a good faith recruiting effort, he has not demonstrated that the position is truly open to U.S. workers in violation of § 656.20(c)(8). He was, therefore, rejected for reasons unrelated to the job in violation of § 656.21(b)(6). Accordingly, the following order shall enter.

⁵ The postmark of the certified letter indicates that it was *mailed* on December 29, 1998 and Mr. Cataudella appeared on the week of January 4, 1999 (Employer in brief indicates Mr. Cataudella appeared on the first day of the year, [January 4, 1999]. This shows the immediacy of Mr. Cataudella's reaction to Employer's letter.)

ORDER

IT IS ORDERED that the CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.